

BRB Nos. 10-0607 BLA
and 10-0607 BLA-A

WILLIAM O. STEPP)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 WOLF CREEK COLLIERIES)
)
 and)
)
 UNITED PACIFIC INSURANCE) DATE ISSUED: 07/27/2011
 COMPANY)
)
 Employer/Surety-)
 Respondents)
 Cross-Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/surety.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer/surety (employer) cross-appeals, the Decision and Order Denying Benefits (2008-BLA-05094) of Administrative Law Judge Pamela Lakes Wood rendered on a claim filed on August 21, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Initially, the administrative law judge found that Wolf Creek Collieries (employer), even though it is now defunct, would remain as a nominal party in this case, and United Pacific Insurance Company would remain as a party-in-interest. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with thirteen years of coal mine employment.¹ Addressing the merits of entitlement, the administrative law judge found that the medical evidence of record was insufficient to establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge erred in finding the medical evidence insufficient to establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not respond to claimant's appeal, unless requested to do so by the Board.²

Employer, in its cross-appeal, contends that the administrative law judge erred in finding that claimant's job as a security guard was qualifying coal mine employment, arguing that claimant's job duties were not integral to the preparation or extraction of

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the administrative law judge credited claimant with less than fifteen years of coal mine employment, a finding unchallenged by claimant.

² We affirm the administrative law judge's findings that the evidence was insufficient to establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3), as unchallenged by the parties on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

coal and, therefore, the administrative law judge's finding should be reversed. Additionally, employer contends that the administrative law judge did not address or resolve the issue of whether employer is the properly named responsible operator and, therefore, requests that, if the case is remanded to the administrative law judge for further consideration, the Board resolve the responsible operator issue prior to remand. In response, claimant urges affirmance of the administrative law judge's finding that his job as a security guard was qualifying coal mine employment, but agrees with employer that the administrative law judge did not make a determination regarding the appropriate responsible operator. The Director, in response to employer's cross-appeal, urges the Board to affirm the administrative law judge's finding that claimant's job as a security guard was qualifying coal mine employment. Additionally, the Director urges the Board to decline to address, at this point, the issue of whether employer is the properly named responsible operator.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415-416, 21 BLR 2-192, 2-196-197 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Claimant challenges the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).⁴ Claimant contends that there is no evidence of any

³ Because claimant's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989); Director's Exhibit 3.

⁴ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

other causative factor of claimant's pulmonary problems, other than his thirteen years of coal mine employment. Claimant contends, therefore, that the administrative law judge erred in according little weight to the opinion of Dr. Mettu, who diagnosed chronic bronchitis due to coal dust exposure. Claimant's Brief at 12. We disagree.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Mettu, Castle and Jarboe.⁵ Dr. Mettu, based on a physical examination and objective testing, diagnosed legal pneumoconiosis, in the form of chronic bronchitis due to coal dust exposure, and opined that claimant had a moderate pulmonary impairment. Director's Exhibits 13, 19; Employer's Exhibit 2. Additionally, Dr. Mettu found that claimant was seventy-four years of age and did not retain the respiratory capacity to perform his last coal mine employment. Director's Exhibit 19; Employer's Exhibit 2. Dr. Jarboe, based on a physical examination, objective testing and review of additional medical evidence of record, opined that claimant was not suffering from coal workers' pneumoconiosis or any other pulmonary impairment caused by coal dust exposure, but that claimant's symptoms were more likely due to bronchial hyperresponsiveness or post-nasal drainage. Director's Exhibit 21; Employer's Exhibit 6. Dr. Jarboe further opined that, from a respiratory standpoint, claimant was capable of performing his usual coal mine employment, but that, from a "whole man" standpoint, he might be disabled due to his coronary artery disease. *Id.* Dr. Castle, based on a review of the medical evidence of record, opined that claimant was not suffering from coal workers' pneumoconiosis, but that claimant had a history of coronary artery disease and a prior myocardial infarction that could account for his respiratory symptoms. Employer's Exhibits 4, 7. Additionally, Dr. Castle opined that there was no significant respiratory impairment and that claimant was not totally disabled. *Id.*

The administrative law judge considered Dr. Mettu's opinion, including his deposition testimony and two supplemental reports, and reasonably discounted it, finding that Dr. Mettu lacked a sufficient explanation for his conclusion that claimant's chronic bronchitis was caused by his coal dust exposure. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 14. Rather, the administrative law judge rationally accorded greater weight to the opinion of Dr. Jarboe, which she found to be the best reasoned and documented opinion of record, because Dr. Jarboe considered all of claimant's symptoms and other findings and reached his conclusion based upon case-

⁵ The administrative law judge found that all of the physicians, Drs. Mettu, Jarboe and Castle, are Board-certified pulmonologists and, therefore, "are all qualified to express opinions concerning [c]laimant's pulmonary diagnosis." Decision and Order at 12.

specific data.⁶ 20 C.F.R. §718.201; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Clark*, 12 BLR at 1-155; Decision and Order at 14. Consequently, the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at Section 718.202(a)(4) is affirmed.

As the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement under Part 718, she properly found that claimant was not entitled to benefits. *See Hill*, 123 F.3d at 415-16, 21 BLR at 2-196-197; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Furthermore, in light of our disposition of the case on the merits, we need not address the issues raised by employer in its cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁶ Specifically, the administrative law judge noted that Dr. Mettu appeared to rely primarily on claimant's negative smoking history and abnormal pulmonary function study, without discussing the impact of claimant's later essentially normal pulmonary function study or claimant's heart disease. Decision and Order at 14. Regarding the opinion of Dr. Jarboe, the administrative law judge noted that Dr. Jarboe accounted for the difference in the pulmonary function study conducted by Dr. Mettu and the study he conducted. Decision and Order at 13. Additionally, the administrative law judge noted that Dr. Jarboe's opinion was based on claimant's "normal gas exchange," his history of coal mine employment, and the fact that the only medication he was on was for blood-pressure-related, lipid-related, or coronary artery disease problems. Decision and Order at 13-14.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge